

No. 15981

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UNITED STATES  
COURT OF APPEALS  
for the Ninth Circuit

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WALTER F. FREEMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLANT'S REPLY BRIEF

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Appeal from the United States District Court for the  
Southern District of California,  
Southern Division.

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FILED  
AUG 29 1958

PAUL P. ...



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## STATEMENT OF FACTS

There is an incorrect statement of facts made by Appellee. On page 4 of Appellant's Brief, commencing on the first line, Appellant states: "In February of 1946 the taxpayer filed an application with the Board for Correction of Naval Records.....". This statement should be: "In February of 1956, after this action was filed, and at the suggestion of the Assistant U.S. Attorney, the Appellant filed an application with the Board for Correction of Naval Records."

This was filed by Appellant when the Assistant U.S. Attorney stated that he would oppose this action unless Appellant so requested on the basis that Appellant had not exhausted his administrative remedies. Rather than have opposition on this score, Appellant filed an application with the Board for Correction of Naval

Records in order to eliminate this cause for opposition by the Assistant U.S. Attorney. It was then, and still is, Appellant's opinion that the percentage of disability rating had nothing to do with this case.

## SUMMARY OF ARGUMENT

The matter of percentage of disability had nothing whatever to do with Appellant's retirement pay as his pay is computed under the laws in effect prior to the Career Compensation Act of 1949. Percentage of disability applies only to new options under this Act which were not elected by Appellant.

30% disability requirement in Section 402(a) of the Career Compensation Act of 1949 does not apply to persons retired prior to the Act. Furthermore, this 30% disability requirement is waived for persons, such as Appellant, who have completed over 20 years of active service.

Appellant was retired after over 24 years of almost continuous service with a determination that his physical disability was "in line of duty" and he was retired as being "not physically fit for any duty."

Appellant had reported his retirement pay as exempt from income tax until in 1952 the U.S. Navy withheld, through error, from Appellant's retirement pay the amount sued for by Appellant.

The primary difference between this present case and the Prince case is that in the Prince case the taxpayer was a commissioned officer and the Army Board acted on his retirement while in this case the Appellant is an enlisted man and it required only a recommendation by a Naval Surgeon.

As to the question of jurisdiction, the Flora case does not apply to this case as the Flora case states only that partial payment of a deficiency assessment must be paid in full while, in the present case, Appellant is claiming a refund of the entire amount withheld from his retirement pay in the year 1952 and his payment is not a partial payment of a deficiency assessment

## ARGUMENT

The Argument of Appellee has a number of incorrect statements.

First, the Navy Department has not determined that taxpayer is not entitled to retirement for disability. This matter of percentage of disability assigned under the Career Compensation Act has nothing whatever to do with Appellant's retirement pay. Percentage of disability applies only to certain options authorized under the Career Compensation Act. These were the new options established by that Act and which were not elected by Appellant. Appellant elected to have his pay continue to be computed on the basis of the laws in effect prior to the effective date of the Career Compensation Act. Prior to the Career Compensation Act there was no percentage of disability assigned. This was a new concept established by this Act

and applied only to certain options authorized thereunder and which Appellant did not elect.

Appellee's reference to Section 402(a) of the Career Compensation Act of 1949 (37 U.S.C. 1952 ed. Sec. 272) on page 8 of the Appellee's Brief has no bearing whatever on this present case. The portion cited by Appellee applies only to temporary retirement of persons for physical disability after the effective date of the Career Compensation Act. Appellant was retired in 1943, many years prior to the adoption of this Act and his pay is computed on the basis of Sections 281 and 311 of 37 USCA, as set forth in Appellant's Opening Brief. Furthermore, 37 USCA 272(f) waives the 30% per centum requirement for persons "who shall have completed at least twenty years of active service." Appellant had over twenty years of active service.

The record is clear that after continuous active service by Appellant from May 6, 1918 to February 18, 1943, except for a period of two and one-half months in 1939, Appellant was found to be physically disabled "in line of duty" and "not physically fit for any duty" and retired from the U.S. Navy. How much clearer can it be set out that Appellant was retired for physical disability "resulting from active service" in the U.S. Navy without an actual finding to that effect. Appellant is and has been receiving retirement pay from the U.S. Navy ever since his retirement on March 1, 1943, based on laws in effect prior to the Career Compensation Act of 1949.

For the entire period prior to the year 1952, Appellant had always reported his retirement pay as exempt from income tax and such claim of exemption had never been questioned by the Treasury Department. It

was not until 1952, when an error was made by the U.S. Navy and income tax was withheld from Appellant's retirement pay, that the exempt status of this pay was questioned by the Treasury Department.

Appellee has attempted to distinguish this case from that of Guyla S. Prince v. United States (112 Ct.Clms. 612, 112 Fed. Supp. 421) on the ground that in the Prince case the right of the retiree to retire for physical disability was determined while in this present case there is no such finding. This is not true. The primary difference between this case and the Prince case is that in the Prince case the retiree was an officer and action was taken by the Army Board. In the Present case, the Appellant was an enlisted man and the only action required to retire Appellant was a recommendation by the Surgeon General of the Navy and



approval of such recommendation by the Chief of the Bureau of Personnel. No board was required and therefore there was not the detailed findings made by a board. The findings of the Naval Surgeon, as shown by the Medical Record of the Appellant (Plaintiff's Exhibit No. 1), as approved by the Surgeon General and the Bureau of Personnel, is the substitute for a Naval Board, which would have been required if Appellant had been a commissioned officer.

In answer to Appellee's statement that under the decision of the Supreme Court in Flora v. United States, 357 U.S. 63, the courts have no jurisdiction over a suit for refund prior to the payment of the entire tax for a given year, this is not the decision in the Flora case. The Flora case holds that where a deficiency is assessed the taxpayer may not pay only a

part of the assessment and then sue for a refund but must pay the entire deficiency before suing for a refund. In this case, the amount claimed as a refund was withheld from Appellant's retirement pay and was not a part of a deficiency assessment. In this connection, on October 2, 1953 Appellant was advised by the District Director of Internal Revenue as follows: "Since your income tax return for 1952 was filed on Form 1040A and the retirement pay was reported thereon, it is the opinion of this office that the assessment of tax under section 51(f) of the Internal Revenue Code does not constitute a "deficiency" within the meaning of section 271 of the Code, and that the Tax Court of the United States has no jurisdiction over the case." The letter further sets forth the procedure of filing a claim for refund and, if denied, the

filing of a suit for refund in the District Court.

This case does not come within the decision in Flora v. United States, supra, as that case applies to a suit for refund after partial payment of a deficiency assessment. This is a suit for refund of the entire amount wrongfully withheld by the United States Navy from Appellant's retirement pay and thereafter paid over to the Treasury Department and has nothing to do with a partial payment of a deficiency assessment.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellant's Opening Brief, the judgment of the District Court should be reversed and a Finding of Fact entered for plaintiff, finding that plaintiff's retirement pay is exempt from income tax and a Judgment for plaintiff be entered in the sum of \$22.10 and the defendant's cross-complaint be dismissed.

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CRITTENDEN & GIBBS,  
By PHILIP CRITTENDEN,  
Attorney for Appellant.

State of California)  
County of San Diego) ss

\_\_\_\_\_, being first duly sworn, deposes and says:

That \_\_\_\_\_ he is a citizen of the United States, resident of San Diego County, over eighteen years of age, not a party to the within cause and has business office at office of attorneys for Appellant, Crittenden & Gibbs, 602 Scripps Building, 525 C Street, San Diego, California; that the names and addresses of the attorneys for appellee are as follows:

Laughlin E. Waters, United States Attorney  
Edward R. McHale, Assistant United States Attorney

808 Federal Building  
Los Angeles 12, California

Charles K. Rice, Assistant Attorney General  
Lee A. Jackson, Chief, Appellate Section,  
Tax Division

Department of Justice  
Washington 25, D. C.

that in each of said places there is delivery service of United States mail, and between said two places there is regular communication by mail; that affiant enclosed \_\_\_\_\_ copies of Appellant's Reply Brief in an envelope addressed to said attorneys, as follows:

Laughlin E. Waters, United States Attorney  
Edward R. McHale, Assistant United States Attorney

808 Federal Building  
Los Angeles 12, California

that affiant enclosed \_\_\_\_\_ copies of



Appellant's Reply Brief in an envelope  
addressed to said attorneys as follows:

Charles K. Rice, Assistant Attorney General  
Lee A. Jackson, Chief, Appellate Section,  
Tax Division

Department of Justice  
Washington 25, D.C.

that affiant sealed said envelope and  
deposited the same in the U.S. Post Office  
at San Diego, California, on the \_\_\_\_\_  
day of August, 1958, with postage thereon  
fully prepaid.

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Subscribed and sworn to before me  
this \_\_\_\_\_ day of August, 1958.

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Notary Public in and for said County  
and State.

